

***NATIONAL WEATHER SERVICE INSTRUCTION 10-2006  
NOVEMBER 11, 2003***

***Operations and Services  
Forensic Services NWSPD 10-20***

***THE ACCIDENT INVESTIGATION/LITIGATION PROCESS***

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***SUMMARY OF REVISIONS:*** This directive supersedes NWS Procedural Directive 10-2006 dated July 2, 2002. Major revisions include amending section 1.1.1 NTSB Investigation Liaison, to indicate a member of the NTSB investigation team will contact the Forensic Services Manager at WSH or the appropriate NWS regional headquarters (RH).

Signed by \_\_\_\_\_ 10/28/03  
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## The Accident Investigation/Litigation Process

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### 1. Accident Investigation Support and Procedures.

#### 1.1 National Transportation Safety Board (NTSB) On-the-Scene Accident Investigation.

After a fatal accident involving an air carrier, the NTSB conducts a field investigation to determine the facts, conditions, and circumstances related to the event. The NTSB may, on occasion, also dispatch a team to investigate other aviation accidents and incidents, as well as marine, rail or highway accidents.

1.1.1 NTSB Investigation Liaison. In circumstances where the NTSB, during the course of the field investigation, requires meteorological information or assistance from the National Weather Service (NWS), a member of the investigation team will contact the Forensic Services Manager at WSH or the appropriate NWS regional headquarters (RH). A routinely updated roster of RH contacts and alternates, with office and home telephone numbers, is provided to the NTSB by the Forensic Services Manager based on information provided by RH. The RH contact will act as liaison between the investigator and NWS offices and personnel. Liaison activity may include providing uncertified (work) copies of records, scheduling interviews of field personnel, and assisting the investigator in any other way as requested.

The benefits of this arrangement are:

- regional awareness of NTSB actions and requirements;
- a reduction in redundant requests for information;
- an NWS official with an understanding of personnel, administrative and mission requirements will make the arrangements for copies of records and interviews; and
- RH and NWS Headquarters (WSH) will be aware of pertinent aspects of the developing investigation and be in a position to provide improved levels of expertise to assist the NTSB, where appropriate.

1.1.2 National Weather Service (NWS) Participation. Based on an initial evaluation of the weather factors and circumstances surrounding an accident/incident, an NWS official may participate in the field investigation at the request of the NTSB Investigator-in-Charge. Such requests will be directed to the Forensic Services Program - any request received at an RH or NWS office will be immediately referred to the Forensic Services Manager. Depending on the circumstances, the designated NWS representative can be from the Forensic Service Program, the appropriate RH program leader, or an official from the nearest NWS office in relation to the NTSB field investigation headquarters. The representative serves as a member of the NTSB Weather Group and the NWS Coordinator/Spokesperson at the field investigation. As coordinator, he/she will:

- act as the liaison official for the NWS (see section 1.1.1);
- assist the NTSB Group Chairperson in gathering appropriate documents, interviewing NWS personnel and other witnesses; and
- participate in the development of the written factual record of the on-scene phase of the accident.

1.2 Weather Documentation Support to the NTSB. The Forensic Services Program will coordinate documentation support to the NTSB except during the field phase of an accident investigation when uncertified copies of weather exhibits can be provided direct to NTSB investigators by NWS offices. Requests for certified weather exhibits from the NTSB, or any other investigating party or person, will be referred to the Forensic Services Manager.

1.3 NTSB Public Hearings. The NTSB, at its discretion, may convene a public hearing in connection with its investigation of a transportation or pipeline accident for the purpose of creating a public record of the facts, conditions, and circumstances relating to the accident. Such hearings are purely fact-finding proceedings, and there are no formal pleadings or issues and idealistically no adverse parties.

1.3.1 Designating Parties to the Investigation. The Hearing Officer may designate as parties to an investigation those persons or Government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident. The Hearing Officer may also designate those who participated in the investigation and whose special knowledge and skills contribute to the development of pertinent evidence.

1.3.2 NWS Spokesperson/Representative. The Forensic Services Manager or designee will be the NWS spokesperson/representative at the NTSB Public Hearing when the NWS is a designated Party to the Investigation.

1.3.3 Prehearing Conference. The Prehearing Conference is held prior to a Public Hearing at the discretion of the Chairperson of the Board of Inquiry or Hearing Officer. Spokespersons representing the designated Parties to the Investigation participate in this conference. They are provided with the witness list, given copies of exhibit material to be introduced, if not previously furnished, and advised of the line of questioning to be developed at the Hearing. The Spokespersons, in turn, are given the opportunity to suggest the addition (or deletion) of witnesses and exhibits, and/or additional evidence or examination which, in their opinion, is pertinent to the Hearing. However, the final decision as to the participation and content of the Hearing rests with the Board.

1.3.4 Privileged Status of Board's Report. Section 701 (e) of the Federal Aviation Act shows the intent of Congress to exclude liability questions from the Board's accident investigation in providing that no part of the Board's report relating to any accident or the investigation thereof shall be used in any suit or action for damages growing out of any matter mentioned in such report. However, as a result of a long history of court interpretation and decisions, the only portion of NTSB reports not admissible as evidence in litigation is the finding of probable cause. In addition, any testimony and factual information developed through the NTSB investigation may be used in subsequent litigation.

1.3.5 Witnesses. The designation of witnesses for Public Hearings is dependent upon the circumstances in each case and will normally be limited to factual-type witnesses (see section 2.1.3). In some instances, the NTSB requests expert witnesses. The selection of NWS employees to participate as factual witnesses is usually decided by the Board, although advice or recommendations are sometimes sought from the spokesperson/representative. The witness list

can be changed during the Prehearing Conference. The spokesperson will notify all prospective witnesses through the RH and will be the focal point for arranging for their participation at the Hearing. Any NWS employee requested or subpoenaed by the NTSB or any investigative party to appear as a witness in any proceeding will immediately refer the matter to the National Oceanic and Atmospheric Administration's (NOAA) Office of General Counsel with concurrent notice to the RH and the Forensic Services Manager.

**1.3.6 Counseling of Witnesses.** All NWS employees designated as witnesses will receive counseling prior to providing testimony at an NTSB Hearing. Pre-counseling sessions normally include a review of weather factors and services surrounding the accident in question, discussions related to procedures and general environment of the Hearing, and other issues of concern. A primary objective of pre-counseling is to make the prospective witness as comfortable and relaxed as possible.

Public Hearings are designed to be purely fact-finding and are generally low-key. However, when a Hearing is convened as a result of a major accident involving considerable loss of life or unusual public interest, it frequently receives maximum media exposure and the interrogation of witnesses may be intensive. It is the responsibility of the spokesperson/representative to ensure prospective NWS witnesses are prepared to testify. An attorney of the General Litigation Division, Department of Commerce (DOC) General Counsel's Office, and other appropriate representatives from WSH or RH will assist in counseling the witness prior to the Hearing.

**1.3.7 Conduct of Hearings.** An NTSB Public Hearing is normally convened within 2 months after an accident and remains in session for 3 to 4 days. Primary participants include: the Chairperson (an appointed member of the NTSB), the Hearing Officer, the Technical Panel, the designated Parties to the Investigation, and the witnesses. Most of the questions addressed to the witness will originate from a member of the NTSB Technical Panel. For NWS witnesses, the Technical Panel member asking the questions is the Chairperson of the Weather Group. The line of questioning initiated by the NTSB examiner is designed to bring out, in logical sequence, certain events and facts to be established in the record. The subject material should be familiar to the witness. Spokespersons or representatives of the designated Parties to the Investigation may ask the witness questions after the Technical Panel examination is completed.

Any question directed to a witness beyond the scope of the accident investigation, the area of interrogation agreed to at the Prehearing conference, or the ability of the witness to respond knowledgeably will be brought to the attention of the Chairperson by the NWS spokesperson for a ruling as to materiality, relevancy, or competency.

**1.4 NTSB Depositions.** The NTSB sometimes finds it more convenient to obtain statements by deposition rather than by personal appearance at an accident investigation hearing. In such cases, an employee's testimony is given under oath in the presence of an NTSB Examiner and taken down by a court reporter for insertion into the official record of the accident investigation. The Forensic Services Manager will ensure the notification, proper counseling, and arrangements for the appearance of any NWS employee scheduled to be deposed under NTSB auspices. The witness must be provided a copy of his/her testimony for review and signature. No NWS employee will waive this right.

1.5 Marine Board of Investigation. The United States Coast Guard Marine Board of Investigation is empowered to summon witnesses; require the production of books, papers, documents, and other evidence; and to administer oaths. Parties in Interest to the investigation hearing may be represented by counsel who may call and cross-examine witnesses. A formal record of the proceedings is made. The Board may consist of one or several investigating officers, depending on the complexity of the case. The hearing is convened soon after the marine accident in question. Procedures for depositions, calling and counseling of witnesses, etc., are similar to those detailed in section 1.3.

1.5.1 Relationship to the NTSB. The NTSB may actively participate in the proceedings of the Marine Board of investigation, request the Marine Board to examine specific points, or may conduct a separate investigation.

1.5.2 NWS Spokesperson/Representative. The Forensic Services Manager or an NWS marine program manager designee will be the NWS spokesperson or representative at United States Coast Guard and NTSB proceedings when the NWS is a designated Party in Interest. An attorney from the General Litigation Division, DOC General Counsel's Office will provide assistance.

1.6 Other Hearings. Other government agencies, either federal, state, or local, may hold hearings relative to an accident. Procedures for such hearings cannot be covered in this chapter. When requests for NWS participation are received, contact the Forensic Services Manager as soon as possible through the appropriate RH.

## 2. Litigation Support and Procedures.

2.1 Litigation Involving the United States Government. The presentation of a Notice of Claim for Damage, Injury, or Death (also referred to as an Administrative claim) is the initial signal of impending litigation against the Government. The Federal Tort Claims Act (FTCA) requires a claim to be presented to the designated Government agency within 2 years of the event motivating the claim. The General Litigation Division, DOC General Counsel's Office will be notified and provided with the original of any administrative claim presented to an NWS office or RH. Forward a copy to the Forensic Services Manager as soon as possible.

A Complaint (suit) against the Government can be filed 6 months after an administrative claim is presented, or after the agency denies the claim, whichever comes first. The filing of suit is followed by the Discovery phase of litigation. Depending on the scope of the case, Discovery normally lasts anywhere from 1 to 3 years.

2.1.1 Depositions and Trials. The deposition is the form of Discovery where NWS employees designated as witnesses experience their first direct encounter with attorneys representing the plaintiffs. A deposition is pretrial testimony, taken under oath. Recorded transcripts can be used in lieu of actual testimony at trial in circumstances where the witness is unavailable for some reason, or when agreeable to both plaintiff and Government attorneys. The law requires a witness be provided a copy of the testimony for review and signature. This offers the opportunity

to verify the accuracy of the deposition transcript. Except on the advice of Government Counsel, no NWS witness shall waive the right to examine and sign his/her testimony.

The trial will occur well after the event initiating the litigation. The trial date will depend on the scope of Discovery, the pretrial legal maneuvering by the involved attorneys, the court's calendar, and a number of other intangibles. All persons previously deposed in connection with the case are potential trial witnesses. An FTCA trial against the Government differs from a corresponding civil proceeding in that there is no jury. An exception occurs when there are multiple defendants, including organizations or individuals outside of the Government. In this circumstance, there may be a jury serving in an advisory capacity regarding the case against the Government. However, the ultimate decision regarding the Government's liability rests solely with the judge.

2.1.2 Selection of Witnesses. Participation of NWS personnel as witnesses in litigation involving the Government is determined either unilaterally by plaintiff's or Government's attorneys, by agreement between the above, or on recommendation of WSH and the appropriate RH. The witness selection depends on the nature of the case and how the prospective witness is designated. In cases where witness selection is made by parties solely outside the NWS, the involved Department of Justice (DOJ) trial attorney (frequently through the General Litigation Division, DOC General Counsel's Office) will notify the Forensic Services Manager, who will in turn inform the NWS employee and the appropriate RH. The Forensic Services Manager will be informed whenever such notification is received direct by an RH or an NWS employee. In accordance with DOC regulations (15 C.F.R. Part 15, Subpart B) NWS employees are prohibited from testifying for a private litigant against the United States. Any employee who is served with a subpoena shall immediately contact a NOAA General Counsel (GC) staff attorney, directly, or through the Forensic Services Manager (see section 2.2).

2.1.3 Designation of Witnesses. Prospective NWS witnesses may be designated either as fact or expert witnesses. Fact witnesses are normally those employees whose duties are tangibly involved in the event motivating the litigation (e.g., duty forecasters). Testimony by fact witnesses should be limited to their duties and performance.

On occasion, the DOJ will solicit recommendations from the NWS for prospective expert witnesses. Expert witnesses are acknowledged experts in their fields, and their testimony will include opinion-type responses. Such witnesses will participate on a voluntary basis. The designation of an NWS employee as an expert witness shall be coordinated between the Forensic Services Manager, the DOC General Counsel's Office and the appropriate RH (or National Centers for Environmental Prediction management) prior to forwarding a recommendation to the DOJ. No NWS employee can be unilaterally designated as an expert witness by a plaintiff's attorney.

2.1.4 Counseling of Witnesses. All NWS employees will receive counseling prior to providing testimony at depositions or trials. The DOJ trial attorney has the responsibility for managing the Government's defense. The attorney will spend considerable time and effort in the preparation of prospective witnesses, to ensure their testimony is credible and contributes to the success of the Government's defense.

The DOJ trial attorneys require considerable assistance and support due to the complex and time-consuming nature of most Government-related litigation. Although the trial attorneys are often proficient in the general field they are defending, i.e., aviation, marine, etc., their knowledge is often limited regarding the technical aspects of weather and the operations of the NWS. The Forensic Services Manager, or designee, and an attorney from the DOC General Counsel's Office will assist the DOJ trial attorney in preparing for the Government's defense. The assistance will include the preparation of NWS witnesses designated to testify at depositions and trials. Although technically and operationally proficient, most NWS employees are not accustomed to serving as a witness at legal proceedings. Additionally, the witness will be asked about an accident/event that has occurred 2 or more years previous. As in preparing for NTSB Public Hearings, a primary objective of pre-counseling is to make the prospective witness as comfortable and relaxed as possible, and enhance his/her capability to provide credible testimony. Pre-counseling sessions will include a review of weather factors and services surrounding the accident in question and NWS operations and procedures as they existed at the time of the accident, discussions related to rules, procedures, and general environment of the deposition/trial, and other issues of concern.

2.2 Civil Litigation/Handling of Subpoenas. NWS personnel are occasionally subpoenaed to appear in their official capacity by private litigants, either to testify or to present official records in evidence.

Under DOC and NOAA regulations, NWS employees cannot produce records or testify in litigation not involving the Government without the consent of NOAA's Office of General Counsel. Any NWS employee served with a subpoena, calling for an appearance to give testimony or for the production of NOAA documents or records, will immediately notify a NOAA GC staff attorney, WSH, either directly, or through the appropriate RH or the Forensic Services Manager. If a NOAA GC attorney is not available, employees may seek advice on how to proceed from the General Litigation Division, DOC General Counsel's office or the nearest Office of the United States Attorney, DOJ. However, the subpoena MUST be honored in the event the employee is unable to reach any of the above, i.e., the employee must appear at the time and place set in the subpoena, provide a copy of the regulations to the legal tribunal, and respectfully decline to testify. The employee shall notify the NOAA's Office of the General Counsel as soon as possible.

2.3 Expenses and Reimbursement. Expenses and reimbursement related to the appearance of NWS employees as court witnesses are listed below.

a. Personnel who appear on behalf of the Government, as part of their official duties as employees of the DOC, are entitled to be paid for their travel expenses and per diem in lieu of subsistence. WSH or the concerned RH will process the Form CD-29, if applicable.

b. Employees who appear on behalf of the Government, but not in an official capacity, are not entitled to the allowance prescribed in paragraph (a) above. However, they are entitled, in addition to regular salary, payment for necessary expenses, itemized and sworn to, incurred in going to, returning from, and attending court. These amounts are payable by the court from the appropriate "Fees of Witnesses, United States Courts."



c. In private litigation cases, where the value of the witnesses' testimony arises from their official capacity, and they are subpoenaed solely because of, and to testify in that capacity, or to produce official records, they are considered on duty and pay status during the period of necessary absence in response to such subpoena. Under such circumstances, the employees will receive allowances for expenses of travel and subsistence.

d. Employees subpoenaed to testify as witnesses in private litigation cases, in an unofficial capacity, are not entitled to fees and expenses from the Government. It is the responsibility of the employee to arrange for payment of witness fees and personal expenses related to their appearance in court. Arrangements may be made with the court or litigants. Time absent will be charged to annual leave or leave without pay.